

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES FLEETWOOD HUMDY, JR.,

Petitioner,

No. C 08-1096 PJH (PR)

v.

ROBERT A. HORE, Warden, and
DIRECTOR OF CORRECTIONS,

Respondents.

**ORDER GRANTING IN
FORMA PAUPERIS STATUS
AND DISMISSING CASE**

This is a habeas case filed pro se by a state prisoner. Petitioner says that he has converted to Judaism and that prison authorities refuse to provide him with kosher meals, food suitable for Jewish festivals, and the services of a rabbi.

If petitioner prevails here it will not affect the length of his incarceration. This means this his claim is not the proper subject of a habeas action, but must be brought as a civil rights case under Section 1983. See *Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991) (habeas corpus action proper mechanism for challenging "legality or duration" of confinement; civil rights action proper method for challenging conditions of confinement); *Crawford v. Bell*, 599 F.2d 890, 891-92 & n.1 (9th Cir. 1979) (affirming dismissal of habeas petition on basis that challenges to terms and conditions of confinement must be brought in civil rights complaint).

In an appropriate case a habeas petition may be construed as a Section 1983 complaint. *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971). Although the court may construe a habeas petition as a civil rights action, it is not *required* to do so. In the time that has passed since the *Wilwording* case was decided there have been significant changes in the law. For instance, the filing fee for a habeas petition is five dollars; for civil rights cases,

1 \$350; and under the Prisoner Litigation Reform Act the prisoner is required to pay it, even if
2 granted in forma pauperis status, by way of deductions from income to the prisoner's trust
3 account. See 28 U.S.C. 1915(a)(2). A prisoner who might be willing to file a habeas
4 petition for which he or she would not have to prepay a filing fee might feel otherwise about
5 a civil rights complaint for which the \$350 fee would be deducted from income to his or her
6 prisoner account. Also, a civil rights complaint which is dismissed as malicious, frivolous,
7 or for failure to state a claim would count as a "strike" under 28 U.S.C. § 1915(g), which is
8 not true for habeas cases.

9 In view of these potential pitfalls for petitioner if the court were to construe the
10 petition as a civil rights complaint, the case will be dismissed without prejudice to petitioner
11 filing a civil rights action if he wishes to do so in light of the above.

12 CONCLUSION

13 1. Leave to proceed in forma pauperis (document number 3 on the docket) is
14 **GRANTED**. Petitioner's prisoner trust account statement has now been filed, so his motion
15 for the court to intervene to obtain it (document number 5) is **DENIED** as moot.

16 2. The petition is **DISMISSED** without prejudice to filing a new civil rights case.

17 **IT IS SO ORDERED.**

18 Dated: April 8, 2008.



PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JAMES F HUMDY JR,
Petitioner,

Case Number: CV08-01096 PJH

CERTIFICATE OF SERVICE

v.

DIRECTOR OF CORRECTIONS et al,
Respondents.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 8, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

James Fleetwood Humdy J-74235
Pelican Bay State Prison
C5-106
P.O. Box 7500
Crescent City, CA 95532

Dated: April 8, 2008



Richard W. Wieking, Clerk
By: Nichole Heuerman, Deputy Clerk